No. 19-6701

In the Supreme Court of the United States

CARL LABAT,

Petitioner

vs.

DARREL VANNOY, WARDEN,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION BY THE STATE OF LOUISIANA

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QUESTION PRESENTED

Did the federal district court abuse its discretion when it made a credibility determination that Petitioner had not pursued his habeas petition with reasonable diligence or shown sufficient extraordinary circumstances to justify equitable tolling?

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INTRODUCTION

Petitioner asks the Court to determine whether his appellate counsel was ineffective (1) for failing to request a supervisory writ from the Louisiana Supreme Court on direct appeal and (2) for failing to raise certain alleged trial court errors on appeal. There are two problems with his request. First, his federal habeas petition, which was filed three years after his conviction became final, was properly dismissed as untimely so there is no federal court ruling on the merits on this claim. Second, even if the lower federal courts had considered the merits of his claims—which are based on state evidentiary and procedural rulings—Labat could not have met the demanding AEDPA standards.

There is no reason for the Court to grant a writ of certiorari. Petitioner has alleged no conflict between the decisions below and any federal circuit court, state court of last resort, or this Court. The federal court ruling that his petition was untimely and undeserving of equitable tolling amounts to nothing more than a fact-based credibility determination and a proper application of established federal jurisprudence. The Louisiana post-conviction rulings on ineffective assistance of appellate counsel, although not properly before this Court, were also fact-based determinations grounded in state evidentiary and procedural law. Under the most generous interpretation of Labat's pro se petition, he asserts that the lower courts made erroneous factual findings or misapplied established law. Thus, he seeks only error correction in this particular case.

STATEMENT OF THE CASE

THE CRIME[1]

In the early morning hours of April 19, 2010, Petitioner shot Travis Anderson 17 times in the parking lot of an IHOP Restaurant in New Orleans causing Anderson's death. Petitioner does not deny he shot Anderson but claims the shooting was in self-defense. Earlier in the evening, Petitioner, his girlfriend, and the victim—along with friends of Petitioner and the victim—were involved in an argument outside Passion's Gentleman's Club in New Orleans where the victim's girlfriend was a dancer. Allegedly, Petitioner slapped the victim's girlfriend provoking the incident. Words were exchanged and, reportedly, one of the members of the group brandished a gun. The argument moved to a nearby apartment complex where Petitioner was seen putting a clip into a handgun and making verbal threats against the victim. Less than twenty minutes later, Travis Anderson was dead.

JUDICIAL PROCEEDINGS

State Court Proceedings

Trial. An Orleans Parish grand jury indicted Labat for second-degree murder.[2] Although Petitioner testified at trial that he was afraid of the victim and thought he saw him reach for a weapon, upon considering all of the evidence presented, on August 26, 2011, the jury found him guilty as charged. The court

[1] These facts are taken from the Magistrate Judge's Report and Recommendation. Petr. Appx. at 3 (PDF pagination).

[2] Petitioner's girlfriend, Sheena Edwards, was also indicted for second degree murder. She ultimately plead guilty to being an accessory after the fact to the murder and was sentenced to 18 months' imprisonment.

sentenced him to life in prison without the possibility of parole.

Appeal. Labat hired private counsel, Michael Kennedy and Tanzanika Ruffin, to represent him on appeal to the Louisiana Fourth Circuit.[3] The appeal brief, filed by Mr. Kennedy on September 10, 2012, claimed one error—the evidence marshalled against him was insufficient to prove that the shooting was not in self-defense. *See State v. Labat*, 2012 WL 4207226 (La. App. 4 Cir.) (Appellate Brief). On April 24, 2013, the Fourth Circuit found that the evidence established that Labat had threatened Anderson before the shooting, that the victim did not like guns, and that no gun was found on or near Anderson's body. It held this was sufficient evidence for the jury to reject Labat's self-defense argument. *State v. Labat*, 2012-1210 (La. App. 4 Cir. 4/24/13), 115 So.3d 665, 672. No application for discretionary supervisory writs was filed with the Louisiana Supreme Court so the conviction became final 30 days after the Fourth Circuit's decision—on May 24, 2013. *See* La. C. Cr. Proc. arts. 912.1, 914, 922; La. S.Ct. R. X, § 5; *see also Butler v. Cain*, 533 F.3d 314, 317 (5th Cir. 2008) (explaining that an appeal is final in Louisiana when the time for seeking further direct review in the state court expired, that is, 30 days after the Louisiana Court of Appeals decision affirming his conviction).

Post-conviction. Labat again hired private counsel to represent him during

[3] Labat claims that he retained only Tanzanika Ruffin to represent him on appeal—*see* Pet. at 2—but the employment agreement lists both counsel, each independent sole practitioners, and the brief to the Louisiana Fourth Circuit was written and filed by Michael Kennedy, who also argued the case, and made no mention of Ms. Ruffin. *See State v. Labat*, 2012 WL 4207226 (La.App. 4 Cir.) (Appellate Brief). It is unclear why the petition only refers to Ms. Ruffin.

state post-conviction proceedings. [4] However, he waited almost two years, until April of 2015, to timely file a petition for state post-conviction relief. This was eleven months after the one-year statute of limitations to file a federal habeas petition had expired.

In his state petition, he claimed, *as he does now*, that his appellate counsel had been ineffective by (1) failing to seek supervisory writs in the Louisiana Supreme Court, and (2) failing to make certain trial error claims. Specifically, Labat argued that the court erred in admitting a cellphone video shot by an individual at the IHOP over a defense timeliness objection; the court erred in refusing to admit testimony from Petitioner's girlfriend's attorney, Glen Woods, that he advised her not to testify; and the court erred in not allowing Deputy Smith to testify regarding a police report and text messages he had seen relating to threats against Petitioner's girlfriend. On October 7, 2015, after additional briefing, the state post-conviction trial court denied relief—reasoning that Petitioner's claims were "speculative as to whether the Fourth Circuit Court of Appeal would have ruled differently had additional arguments been made" and speculative as to whether a request to the Louisiana Supreme Court would have been successful.

Labat filed a counseled application for a supervisory writ to the Louisiana Fourth Circuit, which also denied relief. Citing *Strickland v. Washington*, 466 U.S. 668 (1984), the Fourth Circuit held that Labat had "failed to show that counsel's performance was deficient for failing to raise claims other than sufficiency of

[4] Briefing and the decisions by the post-conviction trial court, circuit court, and Louisiana Supreme Court are attached as Appendix A – K to Petitioner's habeas petition.

evidence claim raised in his appeal and that there [was] a reasonable probability that a different outcome would have resulted from raising other claims."

Again, through counsel, Labat sought a supervisory writ from the Louisiana Supreme Court. On May 12, 2017, citing *Wainwright v. Torna*, 455 U.S. 586, 587–88 (1982), the Louisiana Supreme Court held in a short opinion that Petitioner "fail[ed] to show appellate counsel provided ineffective assistance by failing to pursue discretionary review after the conviction and sentence were affirmed on appeal." *State v. Labat*, 2016-0549 (La. 5/12/17), 219 So. 3d 319. It further held, citing *Smith v. Robbins*, 528 U.S. 259, 288 (2000) and *Mayo v. Henderson*, 13 F.3d 528, 533–34 (2d Cir. 1994), that Petitioner "fail[ed] to show appellate counsel provided ineffective assistance by failing to present claims that were clearly stronger than those presented and that there was a reasonable probability those claims would have prevailed on appeal." *Id.*

Federal Habeas Review

On August 4, 2017, more than three years after his state conviction became final, Labat filed a *pro se* petition for federal habeas relief in the Eastern District of Louisiana raising the same claims the state courts addressed on post-conviction review. The magistrate judge found Petitioner was required by statute to file his habeas petition within a year after his conviction became final—by May 27, 2014—and did not. Therefore, "the literal application of [28 U.S.C. § 2254(d)] would bar Labat's petition as of that date unless he is entitled to tolling as provided for under the AEDPA." *Labat v. Vannoy*, 2018 WL 7291073 (E.D. La. 6/28/18); Petr. App. at

10 (PDF pagination).

As to statutory tolling, the magistrate judge found that—"[b]ecause Labat had not properly filed an application for state post-conviction or other collateral review pending in any state court during that time period" and because a "filing made after the expiration of the AEDPA one-year filing period does not renew or extend the AEDPA filing period or provide a petitioner any tolling benefits"—his "federal petition was not timely filed and should be dismissed with prejudice for that reason." *Id.* (citing *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000); *Higginbotham v. King*, 592 F. App'x. 313, 314 (5th Cir. 2015)). Petitioner does not dispute these findings.

Turning to the jurisprudential equitable tolling doctrine, the magistrate judge considered its application in at least eight other cases and found that Petitioner "had not presented, and the record does not demonstrate, any basis for extending the extraordinary remedy of equitable tolling." The magistrate judge found that Petitioner's statements were not credible nor was an affidavit submitted by Petitioner's aunt. Thus, his petition was not timely filed and should be dismissed. *Id.* Petitioner filed an objection to the magistrate judge's findings arguing, as he does in this petition, that equitable tolling should apply because his appellate counsel "abandoned" him after filing the direct appeal. Appellate counsel allegedly did not answer four letters he wrote to her over an eighteen-month period and she allegedly did not tell him that the Fourth Circuit had denied his appeal. Pet. at 8.

The district court adopted the magistrate judge's recommendation writing in a separate opinion to clarify why Labat could not benefit from equitable tolling. Citing *Holland v. Florida*, 560 U.S. at 648, the district court noted that a petitioner must show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way and prevented timely filing." *Labat v. Vannoy*, 2019 WL 585332 (E.D. La. 2/13/19); Petr. App. at 18; Dist. Ct. Order at 2. The district court found that Labat made no such showing—noting that "the only action Labat took to discover the status of his appeal over a 16-month period involved sending a few letters to his lawyer. As in other similar cases decided by the Fifth Circuit, reasonable diligence requires more." *Id.*

Labat then sought a Certificate of Appealability from the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit denied the COA on October 2, 2019, stating that Labat had "not shown that 'jurists of reason would find it debatable whether the district court was correct in its procedural ruling'" on timeliness. Pet. App. at 1–2; Fifth Cir. Order at 1–2.

This petition for certiorari followed.

REASONS TO DENY THE PETITION

I. THE QUESTION PRESENTED TO THIS COURT FOR REVIEW WAS NOT DECIDED BY THE LOWER FEDERAL COURT

The question presented to this Court for review—whether Petitioner was denied effective assistance of counsel on appeal—was never decided by the federal

district court or the Fifth Circuit.[5] The sole question decided below was whether Petitioner was entitled to habeas review because his petition was untimely filed. The court determined that he was not entitled to review, so the merits of his ineffective assistance of counsel claim were never considered.

This Court is one of final *re*view and not of first view. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). There is nothing regarding the question presented in this habeas case for the Court to *re*view. Furthermore, were it to exercise "first view" of the merits of the question presented,[6] there is no factual record created in the federal courts below to inform the Court's decision. And an ineffective assistance of counsel claim, particularly in this case, is a highly factual claim that does not warrant this Court's review. *See Woods v. Etherton*, 136 S. Ct. 1149 (2016).

[5] Petitioner requests that this Court not hold him to "the same stringent standards as those of a trained attorney," citing *Haines v. Kerner*, 404 U.S. 519 (1972). Pet. 1. However, this Court has since clarified that "the liberal pleading standard of *Haines* applies only to a plaintiff's factual allegations." *Neitzke v. Williams*, 490 U.S. 319, 330 n.9 (1989). The Question Presented in a petition, or fairly included therein, defines the legal issue(s) before the Court. S. Ct. R. 14(1)(a). The liberal pleading standard of *Haines* should not be applied in this circumstance. "The general principle of American jurisprudence [is] that 'the party who brings a suit is master to decide what law he will rely upon.'" *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, concurring) (citing *The Fair v. Kohler Die & Specialty Co.,* 228 U.S. 22, 25 (1913).

[6] Respondent would note that Petitioner's Question Presented is limited to whether *appellate* counsel rendered effective assistance of counsel for allegedly failing to exhaust state remedies by failing to seek supervisory writs to the Louisiana Supreme Court and for presenting inadequate argument *on appeal*. To the extent that he mentions inadequate assistance of trial counsel in the body of his petition, that issue was not raised in any state court nor was it presented to the federal district court. Additionally, Petitioner mentions on p. 1 of his petition that he presented the issue of insufficiency of evidence to the federal courts. This is not accurate.

II. THERE IS NO COMPELLING REASON TO REVIEW THIS CASE

A. Labat Has Shown No Conflict Among Lower Courts

Equitable Tolling. The lower federal courts made a credibility determination that Labat is not entitled to equitable tolling and, therefore, that his habeas petition was untimely filed. This issue is not raised by Petitioner's Question Presented, and it does not warrant review by this Court. It is strictly a federal procedural issue and Petitioner has not alleged, much less shown, that the federal district or appellate court decision conflicts with any decision by another United States court of appeals on this matter. *See* S. Ct. R. 10.

Ineffective Assistance of Appellate Counsel. No decision by the lower federal courts in this case addresses ineffective assistance of counsel. Thus, obviously, no conflict exists between that non-existent decision and a decision by another United States court of appeals or another state court of last resort—nor does Labat argue that there is.[7]

Labat also alludes to the conflict provisions under Supreme Court Rule 10(b) in his Reasons for Granting the Writ. Pet. at 9. However, he is not asking this Court to review a state court decision. He had an opportunity to ask this Court to review the Louisiana court decisions on ineffective assistance of appellate counsel after the issue passed through three levels of state post-conviction review. He did not seek a writ of certiorari at that time, instead opting to pursue relief in the federal courts. He is now asking this Court to review the decision of the Fifth Circuit (and

[7] Although Petitioner combines Supreme Court Rule 10 (a) and (c) and appears to allege that the court of appeal has decided a question that conflict with decision of a U.S. Court of Appeals, he presents no argument regarding that issue.

underlying decision of the federal district court), not to review a state court judgment.

Nevertheless, Labat's argument still reveals no conflict between the Louisiana Supreme Court's decision and that of another state court of last resort, a United States court of appeals, or this Court. The Louisiana Supreme Court's denial of post-conviction relief simply stated that Labat had failed to demonstrate a "reasonable probability" that the arguments not raised by his direct-appeal counsel "would have prevailed on appeal." *Labat*, 219 So. 3d at 319. This is a correct statement of law, *see Smith v. Robbins*, 528 U.S. 259, 288 (2000), and does not create any conflict requiring resolution by this Court.

B. The Asserted Errors in This Petition Consist of No More Than Erroneous Factual Findings or the Misapplication of Established Law

At best, Petitioner appears to be objecting to no more than misapplication of settled law to a narrow issue regarding which a trial court's ruling must be sustained unless clearly erroneous. Since early on, this Court has "adhered to the policy that, when the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, certiorari should generally (*i.e.,* except in cases of the plainest error) be denied." *Kyles v. Whitley*, 514 U.S. 419, 456 (1965) (Scalia, dissenting) (citing *United States v. Johnston*, 268 U.S. 220, 227 (1925)). And, under what the Court calls the "two-court rule," "the policy has been applied with particular rigor when," as in this case, "the district court and court of appeals are in agreement as to what conclusion the record requires." *Id.* at 456–57 (citing *Graver Tank & Mfg. Co. v. Linde Air Products Co.,* 336 U.S. 271, 275

(1949)). As the dissenters asked in *Kyle*,[8] "How much the more should the policy be honored in this case, a federal habeas proceeding where not only both lower federal courts but also the state courts on postconviction review have all reviewed and rejected precisely the fact-specific claim before us." *Id.* at 457 citing 28 U.S.C. § 2254(d) (requiring federal habeas courts to accord a presumption of correctness to state-court findings of fact); *Sumner v. Mata*, 449 U.S. 539, 550, n.3 (1981).

1) *Equitable Tolling*. Petitioner does not dispute that his petition for habeas corpus was filed after the one-year limitation period had expired. Instead, he argues this limitation period should be tolled because his attorney never told him when the Fourth Circuit appellate decision was rendered despite his repeated requests. As proof of this, he attached to his petition four nearly identical letters that he allegedly sent to Ms. Ruffin[9]—who was not the attorney who actually handled the appeal[10]—over a two and a half year period. Petitioner also supplied an affidavit by his aunt that states she tried to reach Ms. Ruffin without success.[11] These

[8] *Kyles v. Whitley* was a capital case and the Court granted certiorari, despite its usual policy, "[b]ecause [its] duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Kyles v. Whitley*, 514 U.S. at 422 (internal quotations omitted). The Court also noted that there was a split decision by the Fifth Circuit. This is not a capital case and there was not even a sufficient showing of denial of a constitutional right for the Fifth Circuit to grant a Certificate of Appealability.

[9] The brief on appeal was filed September 10, 2012. Petitioner allegedly sent his first letter to Ms. Ruffin on January 11, 2013. His next letter was on May 28, 2013. The letters are attached as Ex. A to Labat's Objection to the Magistrate's Report in the record of *Labat v. Vannoy*, Case No. 2:17-CV-07612 (U.S. Dist. Ct. E.D. La.).

[10] The attorney who handled his appeal was Michael Kennedy. *See* Fourth Circuit brief in the habeas record.

[11] The affidavit is attached as Exhibit D to Labat's Objection to the Magistrate's Report in the record of *Labat v. Vannoy*, Case No. 2:17-CV-07612 (U. S. Dist. Ct. E.D. La.).

items/actions, he argues, should suffice to create a reason to equitably toll the one-year statute of limitations.

A number of troubling questions plague Petitioner's petition. For example, why did he attempt to communicate only with an attorney who did not handle his appeal? Why can he offer no proof that the letters were ever sent to or received by Ms. Ruffin?[12] Why did his attorney—one week after the judgment by the Fourth Circuit was rendered—return the entire case file to him, including the full record from the trial court, allegedly with no letter of transmittal or explanation? Why did he hire a post-conviction attorney if he did not know of the result of his direct appeal? Why did he allegedly wait eighteen months to consult with an Offender Counsel Substitute or research his case on Westlaw, both of which he obviously knew were available to him?

In accordance with *Holland v. Florida* and *Manning v. Epps*, 688 F.3d 177, 183 (5th Cir. 2012) *cert. den.* 568 U.S. 1251 (2013), the federal magistrate and district court did not find Petitioner's evidence and arguments credible or substantial enough to show that Petitioner had been "pursuing his rights diligently" or that "some extraordinary circumstances stood in his way and prevented timely filing." Magistrate's R & R at 10-12, Pet. Appx. at 12–14, 18; District Ct. Order at 2. Although an appellate court reviews a district court's decision regarding *statutory* tolling under AEDPA *de novo*, it reviews the district court's decision regarding

[12] While Petitioner has attached copies of four handwritten letters to Ms. Ruffin, almost identical in handwriting style, paper, and pen strength, he has never offered any proof, such as the prison mail log, email record, or an affidavit from Ms. Ruffin, that these letters were actually sent to or received by Ms. Ruffin.

equitable tolling under a deferential abuse of discretion standard. *See Manning,* 688 F.3d at 182 (citing *Prieto v. Quarterman,* 456 F.3d 511, 514 (5th Cir. 2006) *cert. den.* 556 U.S. 1209 (2009)); *see also Davis v. Vannoy*, 762 F. App'x 208 (5th Cir. 2019) (quoting *Hardy v. Quarterman*, 577 F.3d 596, 598 (5th Cir. 2009)). A court must look to the facts and circumstances of each case to determine whether the district court abused its discretion in declining to apply equitable tolling. *Id.* The Fifth Circuit determined that the district court did not abuse its discretion—that "jurists of reason would [not] find it debatable whether the district court was correct in its procedural ruling." Pet. Appx. at 1–2; Fifth Cir. Order at 1–2.

The federal courts properly recognized and applied the law. Petitioner simply disagrees with their conclusions. On this record, the determination was clearly not erroneous. In any event, Petitioner asks for nothing more than error correction in a unique case.

2) Ineffective Assistance of Appellate Counsel. Again, no ruling by the Fifth Circuit or the federal district court addresses ineffective assistance of counsel but, should this Court consider that issue, the decisions by the Louisiana post-conviction courts were wholly fact (and state law) based. In fact, under AEDPA, a determination of ineffective assistance of counsel must be based on an unreasonable application of *Strickland v. Washington* to the facts or an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d). At best, Petitioner asserts an error that consists of erroneous factual findings or the misapplication of the *Strickland* test to his

counsel's choices on appeal. In addition to being highly fact bound, it also involves the application of state evidentiary laws—which do not rise to the level of a constitutional violation.

Petitioner complains that his appellate attorney did not file an application for discretionary supervisory review of the state appeal court decision with the Louisiana Supreme Court.[13] But, as both this Court and the Louisiana courts have recognized, Petitioner had no right to such discretionary review, nor did he have a right to counsel in seeking same. *See* La. Const. art. 5 § 10(A); La. C. Cr. Proc. art. 912.1(B)(1); La. S. Ct. R. X § 5. In *Ross v. Moffitt*, 417 U.S. 600, 610 (1974), this Court held that a criminal defendant does not have a constitutional right to counsel to pursue discretionary state appeals. "Since respondent had no constitutional right to counsel, he could not be deprived of the *effective assistance* of counsel by his retained counsel's failure to file the application timely." *Wainwright v. Torna,* 455 U.S. at 587–88; *see State v. Labat*, 2016-0549 (La. 5/12/17), 219 So. 3d 319.

Petitioner complains that his appellate counsel did not appeal the trial court's ruling admitting a personal cellphone tape taken at the IHOP restaurant the night of the murder. The tape was, allegedly, not disclosed to Petitioner's attorney until a couple of days before the trial began.[14] The video was not exculpatory nor

[13] Petitioner included in this complaint that by failing to pursue a discretionary supervisory writ, appellate counsel did not "exhaust" his state court claims, as required by 28 U.S.C. § 2254 (b) and (c). Petitioner misunderstands the exhaustion doctrine, which does not require that discretionary writs be pursued. Furthermore, Petitioner was not denied federal review of his claims due to the exhaustion doctrine and so the argument is specious.

[14] The facts and arguments presented throughout this section are taken from the briefs filed by Petitioner and the State in the state post-conviction proceedings, copies of which were filed with Labat's petition for habeas corpus and is in the record of those proceedings.

has Petitioner argued that it was. Petitioner has never stated a constitutional claim involving this alleged error. At most, it is a violation of state discovery procedural rules. However, the trial court accepted the State's explanation that it had not received the video until two days before trial and also that it was not required to disclose it to the Petitioner because the State had not planned to use it until a state witness testified, her testimony was challenged, and the video was used to corroborate her testimony. Finally, Petitioner admitted being at the IHOP and shooting the victim, so a video showing his presence (it did not show the crime being committed) was not prejudicial. The admissibility of this video is governed by factual determinations based on state evidentiary and procedural law and is not appropriate for this Court's review.

Petitioner complains that his appellate attorney did not appeal the trial court ruling disallowing testimony by his girlfriend's attorney. Upon the State's objection, Petitioner's attorney could not explain the purpose of the attorney's testimony, other than to explain that he had told his client she had a right not to testify under the Fifth Amendment. The trial court ruled Petitioner had not made a sufficient showing to overcome the attorney-client privilege or show any exception to the rule against hearsay. This is yet another fact and credibility decision and offers no reason for this Court to review a lower court decision.

Petitioner also complains his appellate attorney did not appeal the trial court's ruling excluding testimony by a law enforcement officer that he had read a police report stating that Petitioner's girlfriend had received threats by someone

other than the victim. Upon the State's objection as to relevance and double hearsay, the Court properly did not allow the officer to answer Petitioner's counsel's further questions. This is another fact-driven application of state evidentiary law that was clearly correct.

Additionally, in all cases, Petitioner's trial counsel did not proffer the excluded testimony, which, as the State pointed out in response to Labat's state post-conviction petition, is another reason Labat would have lost had his appellate lawyer raised these alleged evidentiary errors on appeal and provides an independent and adequate state procedural justification to deny review.

Correctly applying *Strickland v. Washington*, the state post-conviction trial court and the Fourth Circuit Court of Appeals found Petitioner had failed to show appellate counsel's performance was deficient for failing to raise claims other than the sufficiency of evidence claim raised in his appeal and that there is a reasonable probability that a different outcome would have resulted from raising other claims. Citing *Smith v. Robbins,* 528 U.S. at 288 and *Mayo v. Henderson,* 13 F.3d at 533–34, the Louisiana Supreme Court held that Petitioner "failed to show appellate counsel provided ineffective assistance by failing to present claims that were clearly stronger than those presented and that there was a reasonable probability those claims would have prevailed on appeal." *See State v. Labat*, 2016-0549 (La. 5/12/17), 219 So. 3d 319.

These decisions were based on the facts and application of Louisiana evidentiary and procedural law. Petitioner is asking this Court to review those

decisions for factual error or to determine whether the Louisiana courts misapplied established law to his unique case. These are not compelling reasons to grant certiorari.

III. LABAT'S HABEAS PETITION WAS PROPERLY DISMISSED AS TIME-BARRED

In addition to the absence of any conflict among the lower courts and the petition strictly asking for error correction, denial of the petition for certiorari is proper because the district court below correctly dismissed Labat's habeas claims as time barred.

Statutory time expired. AEDPA requires that habeas claims be brought within one year of a conviction becoming final, subject to limited exceptions. 28 U.S.C. § 2244(d). In this case, the conviction became final on May 24, 2013. Labat had until May 27, 2014 to bring his claim. As the district court found, he filed no petition for relief within that period and, thus, the statute of limitations expired.[15] Labat does not dispute that the statutory time to file his petition expired.

Equitable tolling. Labat claims that his untimely petition should have been accepted regardless of its untimeliness. He argues that this Court should forgive his late filing due to equitable tolling. But, as the magistrate and district judges found below, his arguments are wrong.

Like any other non-jurisdictional period, AEDPA's one-year limitation period

[15] Although a pending petition for state post-conviction relief could have tolled the limitation under 28 U.S.C. § 2244(d)(2), no such petition was filed before the time ran out. As the Magistrate Judge below found, "[a] filing made after the expiration of the AEDPA one-year filing period does not renew or extend the AEDPA filing period or provide a petitioner any tolling benefits." Pet. App., R. & R. at 9 (citing *Scott v. Johnson*, 227 F.3d at 263; *Higginbotham v. King*, 592 F. App'x at 314). Labat makes no argument that this rule is unsound or that those cases should be overruled.

can be equitably tolled. *Holland v. Florida*, 560 U.S. at 645. This Court has made clear, though, that a petitioner seeking equitable tolling bears the burden of establishing two elements: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Id.* 560 U.S. at 649, 655 (2010) (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

Lack of diligence. The diligence required for equitable tolling is "reasonable diligence." *Holland*, 560 U.S. at 653. Petitioner did no more than allegedly send four letters of inquiry[16] over an eighteen-month period to one of the two attorneys he hired[17] and, inexplicably, *not* to the attorney who had handled the appeal. There is no evidence that he (or his aunt) attempted to contact Michael Kennedy, although he shared office space with Ms. Ruffin and his address and phone number were on the brief filed with the Fourth Circuit—of which Petitioner had a copy.[18] There is also no evidence that Petitioner attempted to call his attorneys or email them through the prison JPAY system.[19]

He also made no attempt to contact an Offender Counsel Substitute or access

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[16] These letters are also included in the record as Exhibit "C" attached to Petitioner's Objection to the Magistrate's Report in *Labat v. Vannoy*, Case No. 2:17-CV-07612 (Dist. Ct. E.D. La.).

[17] Respondent would also note that the contract employing these two attorneys was not with Petitioner but with his aunt, Claudia Washington. Furthermore, the agreement explicitly stated that it was for representation "through trial only" and "does not include any appeal, representation in any post-conviction proceeding" and that "these matters must be the subject of a new fee agreement."

[18] Petitioner seems to suggest that he first received a copy of the brief on August 22, 2013. Pet. at 7. However, his letter dated January 11, 2013, clearly reflects he read the brief when he says, "Why was only one issue or claim raised because I know there were many more."

[19] Admittedly, there is some evidence that he communicated with Ms. Ruffin through other means. In his letter dated May 28, 2013, he mentions that she promised him an in person visit. But here he provides no evidence of that communication and denies he received any communication from her.

Westlaw Correctional in the Law Library to determine the status of his case, both of which were easily accessible to him, as he admits in his petition.[20] Pet. at 7, 9. The Offender Counsel Substitute Program—and adequate law libraries—were established in response to this Court's ruling in *Bounds v. Smith*, 430 U.S. 817 (1977) for the very purpose of providing prison inmates access to the courts. *See* BEN WALLACE, *Jailhouse Lawyers*, WAFB, https://www.wafb.com/story/18686488/jailhouse-lawyers/.

At least sixty-one offender counsel substitutes are on hand at Angola assigned to one of seven teams—including a criminal litigation team and a civil litigation team that handles post-conviction petitions. *Id.* There is a large, well-stocked law library. *Id*. The offender rule book, which each inmate receives, includes information about the law library and offender counsel. Information can be provided to inmates through a "callout," through a letter requesting information, or by dropping by the library and requesting information or signing up for a consultation. Petitioner made no effort to take advantage of this assistance in accessing the courts to learn of the status of his case. Nor did he make any attempt to contact the court, as the petitioner in *Holland v. Florida* repeatedly did.

Finally, once Petitioner learned about the Fourth Circuit decision, despite hiring private counsel, he made no attempt to file a habeas petition *for over two years*. Instead he pursued state post-conviction relief. This fact does not demonstrate diligence. This Court pointed out in *Holland* that "the *very day* that

[20] In fact, an Offender Counsel Substitute drafted his habeas petition and the petition before this Court.

Holland discovered that his AEDPA clock had expired due to [his attorney's] failings, [he] prepared his own habeas petition pro se and promptly filed it with the District Court." *Holland*, 560 U.S. at 653 (emphasis in the original). Similarly, in *Maples v. Thomas*, 565 U.S. 266 (2012),[21] the petitioner, upon learning of the tolling of the statute of limitations, "immediately contacted his mother" who contacted his attorneys' law firm to take action. 565 U.S. at 277. Had Petitioner filed a habeas petition immediately upon learning of the Fourth Circuit decision, this case might be different. Petitioner waited, however, two more years to file his petition. Labat did not exercise "reasonable diligence" in pursuing his legal rights.

Extraordinary circumstances. The second prong of the equitable tolling test requires Petitioner to prove that "some extraordinary circumstance stood in his way and prevented timely filing." *Holland*, 560 U.S. at 649. Petitioner alleges that his "extraordinary circumstance" is that his appellate attorney did not tell him that the Fourth Circuit had rendered a decision. There are two problems with this argument: (1) the courts did not find his allegations credible; and (2) his attorney's actions, or alleged lack of action, were not "egregious" enough to be "extraordinary." *Holland*, 560 U.S. at 651.

Credibility determination. As discussed above, the district court found Labat's claim that he did not know about the Fourth Circuit ruling, despite asking his trial

[21] Much of Petitioner's argument is based on *Maples*. However, *Maples* involved a bar to habeas review when the petitioner failed to meet a *state* procedural requirement and the judgment rested on independent and adequate state procedural grounds. In such circumstances, the bar can be lifted if the petitioner can demonstrate *cause for the default* and actual prejudice. 565 U.S. at 280. Thus, the test was not one of reasonable diligence or extraordinary circumstances as required for equitable tolling and so the case is inapposite.

counsel for updates on the progress of his appeal, suspect. The letters purportedly sent by Labat to his counsel, asking about the progress of his appeal, are not authenticated. Petitioner provides no log from the prison mail system confirming the dates of any *outgoing* mail—even though he provides an alleged log for incoming mail.[22] Nor does he provide an affidavit from his attorney admitting receipt of the letters (or admitting that she failed to tell him about the Fourth Circuit decision).

The letters themselves also appear to contradict his argument. For example, Petitioner admits in his petition that on April 30, 2013—one week after the Fourth Circuit rendered its decision—he received two boxes of the trial transcript from Ms. Ruffin. Pet. at 7. He refers to the printout by the Legal Mail Department at the prison as proof of what he received, but the log itself provides only dates, to whom the mail was addressed, and from whom the mail was sent. Handwritten on the printout is a description of what was in the mail from Ms. Ruffin, but nothing indicates who wrote this information on the printout. It appears to be Petitioner's handwriting. Common sense dictates that the reason a lawyer sends the often expensive transcript of the trial to her client one week after the appellate decision is rendered is to inform him of the decision, let him know she has met her responsibilities to him, and provide the information he needs to proceed further. There is nothing in the record that would contradict that conclusion. It defies common sense that Ms. Ruffin would have sent two boxes containing the record in the case without a letter of explanation.

[22] This "Privileged Mail printout" was attached as Exhibit C to Petitioner's Objection to the Magistrate's Report in the record of *Labat v. Vannoy*, Case No. 2:17-CV-07612 (Dist.Ct. E.D. La.).

In his letter dated May 28, 2013, however, Petitioner claims that he hasn't "heard any response" from Ms. Ruffin and worries that she may have "forgotten about me"—despite having just received two boxes of documents from her. It is curious that, although Ms. Ruffin had been representing Petitioner since September 16, 2011,[23] Petitioner waited until May 28, 2013, to fill out the necessary paperwork to get an in-person visit from her. *See id.*

Petitioner also admits to allegedly receiving the brief filed in the Fourth Circuit on August 22, 2013. Pet. at 7. As proof that he received a brief on that date, he submitted the mail log—with his handwritten notation that the communication received on that date was the brief. All the mail log indicates, though, is that Ms. Ruffin sent him a communication on that date, not what it was. Furthermore, Petitioner already had a copy of the brief so it is unclear why Ms. Ruffin would have been sending an additional copy, especially five months after sending the entire file to Petitioner. Additionally, one would expect that had Ms. Ruffin sent him another copy of the brief, it would have arrived with a cover letter explaining why it was being sent. Yet, in his letter dated November 7, 2013, he again says that he has not "gotten a response" from her. This is another contradictory statement affecting the credibility of his "no communication" claims.

The district court found that Labat's "statements also misrepresent the facts and are not credible." *See* Magistrate Judge's R & R at 11–12; Pet. App. at 13–14. As an example, the district court noted that Labat claimed that he had not learned

[23] *See* the "Fee Agreement and Authority to Represent" attached as Exhibit B to Petitioner's Objection to the Magistrate's Report in the record of the federal district court proceedings.

of the Fourth Circuit decision until eighteen months after it was rendered, yet hired state post-conviction counsel no later than sixteen months after the decision was rendered. *Id.* The Magistrate Judge also noted that the affidavit allegedly from Labat's aunt was not credible or persuasive because the "relevant portions of the affidavit do not address matters within the affiant's personal knowledge, such as what the retained attorney knew or mailed to Labat or what Labat knew or received through the prison mail system." *Id.* Respondent further suggests that it is not credible that Petitioner's aunt—who also received a copy of the brief and record—made numerous phone calls and visits to Ms. Ruffin's office, which she shares with Mr. Kennedy, but made no attempt to speak to Mr. Kennedy, who handled the appeal.

Egregiousness. This Court has made clear that the "exercise of a court's equity powers must be made on a case-by-case basis," *Holland*, 560 U.S. at 649–50 (internal quotation marks omitted). However, "the circumstances of a case must be 'extraordinary' before equitable tolling can be applied." *Id.* at 652.

It is undisputed that, one week after the Louisiana Fourth Circuit decision was rendered, appellate counsel returned the client file, including the transcript of the entire proceeding, to Petitioner. Labat has not met his burden of proving that she did not also tell him, at that time, that the appeal was over. She also communicated with him four months later. Petitioner waited three years to file a petition for habeas relief. Looking to other precedent to guide the lower court's judgment in this case, no non-capital case has tolled the statute of limitations for

three years based on facts similar to those presented by Petitioner.

Labat relies on *Holland v. Florida* for the proposition that his attorney's conduct created extraordinary circumstances. But *Holland* is distinguishable for many reasons. First, in *Holland*, a capital case, the petition for federal habeas relief was filed approximately five weeks late. *Holland*, 560 U.S. at 635. Here, Labat's petition was filed over three years late. Second, the petitioner in *Holland* repeatedly sent letters emphasizing the importance of filing a federal petition and identifying the applicable legal rules. *Id.* at 652. He repeatedly asked his attorney to file his habeas petition. *Id*. at 637–38; *see also Baldayaque v. United States*, 338 F.3d 145, 152 (2d Cir. 2003). Labat did neither. Furthermore, Holland's counsel promised to timely file the petition for Holland. *Id.* at 636. *See also Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001). Ruffin and Kennedy promised only to handle the appeal, if anything.[24] Third, Holland twice wrote to the Florida Supreme Court asking for a new lawyer and arguing that his counsel had "abandoned" him. *Id.* at 636–37. Labat took no action to remove his appellate lawyers. Fourth, in response to his request for new counsel, the State argued that Holland could not file any *pro se* papers while represented by counsel, including papers seeking new counsel, and the Florida court agreed and denied his request. *Id*. at 637. The State of Louisiana took no action—whether through counsel or the courts—that interfered with Labat's right to pursue habeas relief. *Holland* is therefore distinguishable.

[24] The agreement, attached as Exhibit B to Petitioner's Objection to the Magistrate's Report in the district court record of *Labat v. Vannoy*, explicitly stated that it was for representation "through trial only" and "does not include any appeal, representation in any post-conviction proceeding" and that "these matters must be the subject of a new fee agreement."

The circumstances found to satisfy the test in other cases actually have been "extraordinary." *See, e.g., Miller v. New Jersey State Dep't of Corrections*, 145 F.3d 616 (3d Cir. 1998) (prisoner in transit between institutions was unable to access legal documents); *Spitsyn v. Moore*, 345 F.3d 796, 800–02 (9th Cir. 2003) (attorney refused to turn over files/record to prisoner); *United States v. Martin*, 408 F.3d 1089, 1096 (8th Cir. 2005) (attorney repeatedly lied to petitioner). A unifying thread through all of these cases is that it was *impossible for the prisoner to file his own petition* for habeas.

Labat's attorneys provided him with the entire transcript of the underlying proceeding. Labat did not hire them to file a habeas petition, and they did nothing to lead him to believe that they were going to file a petition for habeas relief. He had numerous avenues to learn about the status of his appeal, had he diligently pursued them. Neither his attorneys, nor the State, impeded his ability to timely file a petition for habeas relief. The circumstances of this case do not justify equitable tolling.

IV. SHOULD THIS COURT DETERMINE THAT LABAT'S PETITION IS NOT TIME-BARRED, HE WILL STILL LOSE ON HIS UNDERLYING INEFFECTIVENESS OF COUNSEL CLAIM

Finally, even if Labat had timely filed for federal habeas relief, or if this Court decides that equitable tolling applies, he still would not be entitled to the relief he seeks. Labat's petition fails to grapple with AEDPA's daunting standards for federal habeas petitions. These standards doom his claim for relief on the merits.

AEDPA demands that an applicant show that the state judgment which he challenges "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or else was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "When the claim at issue is one for ineffective assistance of counsel, moreover, AEDPA review is 'doubly deferential.'" *Woods v. Etherton*, 136 S. Ct. at 1151 (2016) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011)). This is because counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (quoting *Burt v. Titlow*, 134 S. Ct. 10, 17 (2013)). Labat cannot meet this demanding standard. *See Harrington v. Richter*, 562 U.S. 86, 102 (2011) ("If [the AEDPA] standard is difficult to meet, that is because it was meant to be.").

Labat appears to argue that it was *per se* ineffective assistance of counsel for his lawyer on direct appeal not to seek a supervisory writ from the Louisiana

Supreme Court after losing in the intermediate court. Petitioner wholly misperceives the law on this issue. As the Magistrate Judge said below, "Louisiana law is clear that a direct appeal in a case like this may only be taken to the intermediate circuit appellate court." Pet. App. at 14, R. & R. at 12 (citing La. Const. Art. 5 § 10(A); LA. C.CR. P. art. 912.1(B)(1)). Further review by the Louisiana Supreme Court is wholly discretionary and is "not a right or mandated part of the direct appeal." *Id.* Furthermore, failure to seek the writ did not affect Petitioner's right to pursue his ineffective assistance of counsel claims on post-conviction review or in federal habeas proceedings, as alleged by Petitioner. In fact, he received a full review of those claims at all levels of the Louisiana court system, including the Louisiana Supreme Court.

On the insufficiency issue, the Fourth Circuit was correct. It found that the evidence established that Labat had threatened Anderson before the shooting, that the victim did not like guns, and that no gun was found on or near Anderson's body. It correctly held this was sufficient evidence for the jury to reject Labat's self-defense argument.[25]

Because Petitioner had no right to discretionary review by the Louisiana Supreme Court, he had no right to counsel for that proceeding. *Ross v. Moffitt*, 417 U.S. 600 (1974). "Since respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely." *Wainwright v. Torna*, 455 U.S. 586, 587–88 (1982).

[25] *State v. Labat*, 2012-1210 (La. App. 4 Cir. 4/24/13), 115 So.3d 665, 672.

There is no support in either Louisiana or Federal cases for the proposition that failing to seek writs shows a lawyer to be ineffective. Labat was entitled to one counseled appeal, and he received it.

Furthermore, after full review of Petitioner's other ineffective assistance claims by all levels of Louisiana post-conviction review, the Louisiana Supreme Court correctly denied relief, saying that Labat "fail[ed] to show appellate counsel provided ineffective assistance by failing to present claims that were clearly stronger than those presented and that there was a reasonable probability those claims would have prevailed on appeal." *Labat,* 219 So. 3d at 319 (citing *Smith v. Robbins*, 528 U.S. at 288). Labat states, in conclusory fashion, that the alternative grounds for appeal discussed in his petition "are certainly more persuasive" than the argument actually raised (insufficiency of the evidence). But that is pure speculation, as discussed in more detail above.

Thus, the Louisiana courts did not act contrary to clearly established federal law when they denied post-conviction relief. Labat's proposed arguments, as explained in more detail above, would have completely failed if advanced in state court. Were this case remanded to the district court, that court would hold that Petitioner's claims of ineffective assistance of counsel are meritless and, again, dismiss his petition. Therefore, granting this writ would be a waste of this Court's time and resources.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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